

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN -5 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0144-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LUIS JAMES GALLARDO JR.,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2009007393001DT

Honorable Lisa M. Roberts, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Luis Gallardo Jr.

Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Luis Gallardo Jr. seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Gallardo has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Gallardo was acquitted of armed robbery and convicted of theft of a means of transportation. The trial court imposed an enhanced, presumptive 11.25-year term of imprisonment. Gallardo's conviction and sentence were affirmed on appeal. *State v. Gallardo*, No. 1 CA-CR 10-0252 (memorandum decision filed Apr. 19, 2011). Because he was on probation in two other causes at the time of the offense in this cause, the trial court ordered the sentence in this case to be served consecutive to the sentences imposed for his earlier convictions pursuant to A.R.S. § 13-708(c).

¶3 Gallardo then initiated a proceeding for post-conviction relief, arguing in his petition for post-conviction relief that he had received ineffective assistance of counsel based on trial counsel's failure "to properly advise [him] during plea negotiations that if he was convicted of the charges, the sentencing court must run his sentences consecutively" to those imposed for his earlier convictions. The trial court summarily denied relief.

¶4 On review Gallardo essentially repeats his arguments below and asserts that if he had known "that his sentences would have to be imposed consecutively," "he likely would have accepted the state's original plea offer," which would have allowed him to plead guilty to the charge of armed robbery and receive a 9.25-year sentence, followed by a term of probation.¹ In order to state a colorable claim of ineffective assistance of

¹Gallardo also asserts on review that counsel also failed to inform him that his sentence would be served as "flat time" without the possibility of early release. He did not make this claim below, and we therefore do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review).

counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). An attorney's failure to give accurate advice or information necessary to allow defendant to make informed decision whether to accept a plea agreement can constitute deficient performance. *State v. Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d 1193, 1200 (App. 2000). The burden of proof is on the defendant to show ineffective assistance of counsel by a preponderance of the evidence. *State v. Prince*, 142 Ariz. 256, 260, 689 P.2d 515, 519 (1984).

¶5 The trial court conducted a *Donald* hearing to assure that Gallardo understood the consequences of his decision to reject the state's plea offer. *See Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d at 1200. The court explained to Gallardo that if convicted of the armed robbery charge he would face a minimum sentence of 10.5 years and a maximum sentence of twenty-one years. And the court explained that if convicted of the theft of means of transportation charge Gallardo would face 11.25 years to twenty-five years in prison. Gallardo responded that he understood and said, "I'd like to just exercise my rights to a speedy trial and make sure it's on the record." Later, at sentencing, counsel indicated he had not informed Gallardo that the trial court would be required by statute to impose any sentences in this cause to be served consecutive to a sentence for Gallardo's earlier conviction. But he also stated that he had informed Gallardo that consecutive sentences were possible. And when given an opportunity to speak himself, Gallardo did not address the consecutive sentences.

¶6 On the record before us, Gallardo failed to present a colorable claim entitling him to an evidentiary hearing because he did not comply with the requirements of Rule 32.5. That rule requires a petitioner to provide the trial court with “[a]ffidavits, records, or other evidence currently available to [him] supporting the allegations of the petition,” including “[f]acts within [his] personal knowledge [which] shall be noted separately from other allegations of fact and shall be under oath.” Ariz. R. Crim. P. 32.5.² Here, Gallardo cited no evidence in the record to support his claim that had he known he would have to serve consecutive sentences he would have accepted the state’s plea agreement offer, nor did he offer other evidence tending to establish the truth of that assertion. Indeed, the record before us belies his assertion, particularly in light of the fact that Gallardo has not pointed us to anything in the record suggesting he would not have had to serve his sentences consecutively pursuant to § 13-708(c) even had he accepted the state’s plea offer.

¶7 In any event, an unsubstantiated argument does not take the place of an affidavit or other sworn statement required to establish a colorable post-conviction claim warranting an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d at 1200 (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn

²We cite to the version of the rule effective at the time Gallardo filed his petition. Rule 32.5 was amended effective Jan. 1, 2013, but those changes are not material here. Ariz. Sup. Ct. Order No. R-12-0009 (Aug. 30, 2012).

statements). And a bare allegation of prejudice, without supporting evidence, is insufficient to create a colorable claim. *See Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201. The trial court did not, therefore, abuse its discretion in denying relief. Thus, although we grant the petition for review, we deny relief.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller

MICHAEL MILLER, Judge